

Before the
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:)	
)	
Implementation of the Satellite Home Viewer Improvement Act of 1999)	CS Docket No. 00-96
)	
Broadcast Signal Carriage Issues)	
)	
Emergency Petition of National Association of Broadcasters and Association of Local Television Stations to Modify or Clarify Rule)	
)	
To: The Commission		

**JOINT COMMENTS OF WLNY-TV INC. AND
GOLDEN ORANGE BROADCASTING CO.
ON NAB AND ALTV EMERGENCY PETITION**

WLNY-TV Inc. ("WLNY") and Golden Orange Broadcasting Co. ("Golden Orange"), by counsel and pursuant to the Cable Services' Bureau's January 8, 2002 *Public Notice*, DA 02-31 ("*Public Notice*"), hereby submit their joint comments on the Emergency Petition filed by the National Association of Broadcasters ("NAB") and the Association of Local Television Stations ("ALTV") in the captioned matter.

I. STATEMENT OF INTEREST

WLNY is the licensee of independent UHF Station WLNY-TV, Channel 55, Riverhead, New York. Golden Orange is the licensee of independent UHF Station KDOC-TV, Channel 56, Anaheim, California. WLNY-TV is located in the New York City DMA. KDOC-TV is located in the Los Angeles DMA. WLNY-TV and KDOC-TV have both been relegated by Echostar Communications Corporation ("Echostar") to carriage on only Echostar's so-called "wing slot" satellites in their respective markets. WLNY-TV and KDOC-TV are thus among the parties with

the most direct possible stake in this matter. Both are among the “disfavored” stations being severely and irreparably injured by Echostar’s discriminatory and unlawful relegation of their signals to what the NAB and ALTV have properly termed a “technological ghetto.”

II. ECHOSTAR IS IN CLEAR VIOLATION OF EXISTING FEDERAL LAW

The NAB/ALTV Petition is too generous to Echostar in requesting a mere “clarification” of supposedly “ambiguous” FCC rules. Echostar’s intentionally discriminatory actions clearly transgress both the unambiguous requirements of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”) and the FCC’s implementing decisions and regulations. Specifically, Echostar’s discriminatory carriage actions flagrantly violate (1) SHVIA’s prohibition of discriminatory treatment with respect to access via navigation devices; (2) SHVIA’s requirement that local stations be provided on contiguous channels; (3) the FCC’s clear prohibition, in its reconsideration order implementing SHVIA, of discriminatory second receive dish requirements; and (4) 47 C.F.R. §76.66(k)’s prohibition of discriminatory treatment with respect to delivered signal quality.

1. Violation of 47 U.S.C. §338(d)’s Requirement of Nondiscrimination as to Signal Availability on Navigation Devices

Echostar’s relegation of “disfavored” independent stations to carriage on secondary “wing slot” satellites from which signal reception is possible only by means of a second receive dish directly violates SHVIA’s prohibition of discriminatory treatment with respect to signal availability on navigation devices. SHVIA states that satellite carriers “shall retransmit the signal of the local television broadcast stations to subscribers in the stations’ local market . . . and provide access to such station’s signals . . . in a nondiscriminatory manner on any navigational device.” 47 U.S.C. §338(d). Satellite receive dishes are, without question, navigational devices,

and it is equally plain that Echostar has discriminated against WLNY-TV, KDOC-TV and the other “disfavored” stations with regard to signal availability via receive dishes.

The FCC has adopted the following definition of “navigation device” for purposes of Section 629 of the Communications Act, 47 U.S.C. §549 (competitive availability of navigation devices): “Devices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. §76.1200(c); *see also* 47 U.S.C. §549(a). In adopting this definition, the Commission stated:

We believe that the statutory language of Section 629 indicates that its reach is to be expansive and that Section 629 *neither exempts nor limits any category of equipment used to access multichannel video programming services* offered over [multichannel video] systems from its coverage. Equipment used to access video programming and other services offered over multichannel video programming systems include televisions, VCRs, cable set-top boxes, personal computers, program guide equipment and cable modems.¹

Section 338(d)’s prohibition of discrimination with respect to signal availability on navigational devices has a similarly expansive purpose, and thus the definition adopted under Section 629 is fully applicable to Section 338(d) as well. Under that definition, a satellite receive dish is plainly a “navigational device,” because a satellite dish is indisputably (and indispensably) “used by consumers to access multichannel video programming and other services offered over” Echostar’s multichannel video programming service. Section 338(d) thus directly prohibits Echostar from discriminating against some local stations and in favor of others with regard to their availability via satellite receive dishes. That is exactly what Echostar has done, and its

¹ *Report and Order* in CS Docket No. 97-80 (*Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*), 13 F.C.C. Rcd. 14775, 14784 (1998) (¶25) (emphasis added).

action directly violates Section 338(d)'s prohibition of discriminatory treatment with regard to signal availability on navigation devices.

2. Violation of 47 U.S.C. §338(d)'s Contiguous Channels Requirement

Echostar has also violated SHVIA's unambiguous requirement that local broadcast stations must be carried on contiguous channels. SHVIA states: "[T]he satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels." 47 U.S.C. §338(d). Echostar has directly violated this unambiguous statutory requirement by transmitting from its main CONUS satellites the signals of its "favored" local stations (largely VHF major network affiliates) on channels that are *not* contiguous with the channels Echostar has assigned to its "disfavored" local independent stations relegated to secondary "wing slot" Echostar satellites.²

It matters not that Echostar has sought to appease Section 338(a)'s contiguous channel requirement by transmitting its "favored" local signals twice, once from their exclusive, preferred channel position on Echostar's main CONUS satellites, and again redundantly from Echostar's secondary "wing slot" satellites. This ploy simply means that Echostar has violated the contiguous channel requirement only once, not twice. Echostar's CONUS satellite channel

² Attachment A contains what WLNY-TV and KDOC-TV understand to be Echostar's current local broadcast signal channel lineups available via Echostar's main CONUS satellites and its secondary "wing slot" satellites in the New York and Los Angeles DMAs. In both markets, Echostar is providing its "favored" (largely VHF and major network affiliate) local broadcast signals from its main CONUS satellites – receivable without a second receive dish – on a block of channels which is *not contiguous* with the channels that carry any of the "disfavored" (largely independent UHF) local stations that Echostar has relegated solely to its secondary "wing slot" satellites which require a second receive dish. Currently available information on Echostar's Web site (www.dishnetwork.com/content/programming/locals/index.shtml) indicates that Echostar has pursued an identical discriminatory carriage pattern in 30 of the 36 markets into which it transmits local broadcast signals, and has thereby severely disadvantaged over 100 independent and noncommercial stations across the country by relegating their signals to Echostar's "wing slot" satellite "technological ghetto."

offering plainly is *not* in compliance with Section 338(a), because it includes only Echostar's "favored" select local signals and not *all* local signals on contiguous channels. Section 338(d) does not state that satellite carriers may retransmit local signals in any noncontiguous, discriminatory manner of their choosing, so long as *somewhere* in obscurity in their 400 to 500-channel offering they provide all local broadcast signals in a contiguous block. Section 338(d) rather imposes an absolute, unqualified and categorical requirement that local signals *shall*, without exception, be provided on contiguous channels. By providing only its "favored" major network affiliate signals on its preferred CONUS satellite local broadcast signal block, Echostar has directly violated SHVIA's anti-discrimination requirement that local broadcast signals shall not be carried on noncontiguous channels.

3. Violation of the FCC's Prohibition on Second Dish Discrimination Set Forth in the FCC's *Reconsideration Order*

Echostar has also directly violated the FCC's unambiguous ruling, in its *Order on Reconsideration* in the SHVIA implementation proceeding,³ that satellite carriers are expressly forbidden to do exactly what Echostar has done – configure a local broadcast signal offering in a manner which discriminatorily requires a second receive dish for the reception of some local signals and makes other "favored" local signals available without a second receive dish. In its *Reconsideration Order*, the FCC stated:

The legislative [history involving a] drafting change, at most, indicated that Congress did not want to prohibit satellite carriers from requiring additional dishes generally, but the change does not imply that Congress wanted to allow satellite carriers to require additional dishes *if such a requirement created discriminatory effects*. *We believe that a limited prohibition on requiring subscribers to obtain a separate receive dish to receive some local signals when*

³ *Order on Reconsideration* in CS Docket No. 00-96 (*Implementation of the Satellite Home Viewer Improvement Act of 1999 – Broadcast Signal Carriage Issues*), 16 F.C.C. Rcd. 16544 (2001) (hereafter "*Reconsideration Order*").

other local signals are available without the separate dish is necessary to give full effect to local station carriage requirements. Otherwise, . . . satellite carriers could structure local station packages and separate dish requirements to discourage consumers from subscribing to certain local stations.

Reconsideration Order, 16 F.C.C. Rcd. at 16566 (¶41) (emphasis added). In language that could scarcely be more clear, the FCC has thus expressly prohibited precisely what Echostar has done – require that its subscribers “obtain a separate dish to receive some local signals when other local signals are available without the separate dish.” Echostar’s action violates the clear FCC policy set forth in paragraph 41 of the *Reconsideration Order* prohibiting discriminatory “second dish” requirements for some but not all local stations.⁴

4. Apparent Violation of 47 C.F.R. §76.66(k)’s Prohibition of Discrimination in Delivered Signal Quality

WLNY-TV and KDOC-TV also believe that Echostar’s discriminatory “second dish” requirement violates Section 76.66(k) of the Commission’s rules. The signal quality of those local broadcast signals available with a second dish via Echostar’s secondary “wing slot” satellites periodically appears observably worse than that of Echostar’s “favored” local signals, as provided, without a second dish, via Echostar’s CONUS satellites. This discrimination in signal quality, which WLNY-TV has witnessed in the New York market, is apparently due to Echostar’s use of less favorable digital compression techniques for its “wing slot” satellite signals. This discriminatory signal quality disparity clearly violates 47 C.F.R. §76.66(k)’s

⁴ Echostar will doubtless argue that the FCC’s formal rule (47 C.F.R. §76.66(i)(4)) prohibits only a requirement that subscribers *purchase* a second dish to receive some but not all local signals. The FCC is not required, however, to embody its interpretive and policy proscriptions in formal regulations. The FCC routinely includes interpretive rulings and policy prohibitions, not embodied in formal rules, in its rule making orders and decisions. Such policy prohibitions and rulings may be reconsidered or modified by the Commission itself (but not its subordinate entities) without a formal rule making proceeding, but they are otherwise fully binding on the public. One can ignore them – as Echostar has done – only at one’s peril.

requirement that “Each local television station whose signal is carried under mandatory carriage shall . . . be provided with the same quality of signal processing provided to television stations electing retransmission consent.”⁵

III. THE FCC SHOULD PROMPTLY ORDER ECHOSTAR TO COME INTO IMMEDIATE COMPLIANCE WITH FEDERAL LAW

The FCC has asked in its *Public Notice* for comment on whether it should issue a declaratory ruling or other clarification or should amend its rules in a further rule making. Echostar is in flagrant violation of SHVIA’s unambiguous statutory requirements, as well as those of the FCC’s implementing regulations and policies. A further rule making is not needed to remedy Echostar’s willful violations of existing federal laws. The Commission should promptly issue an order declaring Echostar to be in violation of existing federal laws and ordering Echostar to come into immediate compliance with federal law.

Echostar has engaged in blatantly discriminatory and obviously unlawful activity. It is no secret that the practical effect of Echostar’s action is little different than if Echostar had simply refused to carry its “disfavored” local signals altogether. WLNY-TV and KDOC-TV estimate that fewer than one percent of Echostar’s customers currently have, have sought or even know about the second receive dish that is necessary to receive the “wing slot” satellite transmissions of Echostar’s “disfavored” local broadcast signals. In all likelihood, fewer than five percent of Echostar’s subscribers would *ever* seek to obtain such a second receive dish, whether or not offered for “free,” given the substantial burdens involved in seeking, obtaining and maintaining a

⁵ WLNY-TV and KDOC-TV both elected “must carry” status on Echostar’s service (as doubtless did most or all of the other “disfavored” stations that Echostar has relegated to its secondary “wing slot” satellites). Many (if not all) of Echostar’s “favored” major network affiliate stations which Echostar is making available, without a second dish, from its main CONUS satellites elected retransmission consent status.

second dish.⁶ Echostar's actions thus effectively deny WLNY-TV, KDOC-TV and Echostar's other "disfavored" local stations the very thing SHVIA was intended to provide – access to Echostar's multichannel video service subscribers.

Echostar was well of aware of all this when it proceeded, unilaterally, to pursue its discriminatory and unlawful carriage plan. Echostar also plainly acted in bad faith in pursuing that discriminatory plan. Echostar did *nothing* prior to January 1, 2002 (and it has done little or nothing of substance since) to publicize and promote its so-called "free" second receive dish offer. Echostar provided *no* form of notice to its subscribers, placed *no* advertisements, issued *no* press releases and sent out *no* mailings publicizing its plan. It did not even provide notice to the affected local broadcast stations, such as WLNY-TV and KDOC-TV, that it was relegating their signals to "wing slot" satellites receivable only with a second receive dish. Although Echostar now claims that it was an alleged lack of channel space, due to delayed satellite equipment deliveries, which prompted its discriminatory carriage plan, that purported excuse – if true – should have been presented to the FCC in a waiver or clarification request *in advance* of January 1, 2002. Rather than follow the proper path in seeking prior FCC approval, Echostar acted unilaterally to implement its discriminatory and unlawful carriage plan. Given this course of conduct, Echostar's current claims of purported "satellite delivery delays" come too late, are

⁶ The NAB/ALTV Petition points out the many burdens and impediments – what NAB/ALTV politely term the "hassle factor" – that are involved in seeking to obtain a second receive dish merely to receive Echostar's "disfavored" local broadcast signals. Such serious burdens and impediments are certain to discourage virtually all Echostar subscribers from seeking the purportedly "free" second dish, even were Echostar to publicize and promote the "free second dish" offer aggressively – something it is certain Echostar will never do. In addition, many Echostar subscribers are doubtless prohibited by practical or legal constraints from having more than a single dish. Moreover, it appears that Echostar's so-called "free" second dish offer is not even a permanent offer, but rather is available only for a "limited time" – until March 31, 2002. See Attachment B (at asterisk footnote), which contains a copy of a letter recently sent by Echostar to its subscribers in the New York market.

entitled to no weight and would warrant no relief even in the unlikely event that they were proved to be the actual reason behind Echostar's discriminatory conduct.⁷

IV. CONCLUSION

For the foregoing reasons, the FCC should order Echostar to come into immediate compliance with its local signal carriage obligations by placing all local broadcast signals which it carries on contiguous channels on its CONUS satellites *within one week* of the release date of the FCC's order. The FCC should brook no excuses, permit no delays and grant no stay or other extension of time for Echostar's full compliance with its carriage obligations.⁸

Respectfully submitted

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Dated: January 23, 2002

⁷ Echostar has had *more than one year* (the FCC's *Report and Order* was released on November 30, 2000) to plan for compliance with the "carry one-carry all" requirements of SHVIA, and it has *between 400 and 500 channel positions available* within which to find the necessary channels for carriage of local broadcast signals on either its CONUS or its "wing slot" satellites in the required nondiscriminatory and contiguous manner. Echostar's claim that its discriminatory conduct was caused by delayed satellite equipment deliveries is thus errant nonsense and palpably false.

⁸ Full utilization of channel capacity and pre-existing contractual commitments provide no excuse for a cable television system seeking to avoid its mandatory broadcast signal carriage obligations, and the same rule must apply equally to satellite providers such as Echostar. *See, e.g., Report and Order* in MM Docket No. 92-259, 8 F.C.C. Rcd. 2965, 2988 (1993) (¶89); *Golden Link TV, Inc.*, 13 F.C.C. Rcd. 836, 838 (CSB 1998) (¶6); *Complaint of Christian Faith Broadcast, Inc.*, 10 F.C.C. Rcd. 5483, 5483-84 (CSB 1995) (¶7); *Apollo CableVision, Inc.*, 10 F.C.C. Rcd. 579, 579-80 (CSB 1995) (¶6); *Complaint of Fouce Amusement Enterprises, Inc.*, 10 F.C.C. Rcd. 577, 577-78 (CSB 1995) (¶5).

CERTIFICATE OF SERVICE

I, Barbara J. McKeever, hereby certify that, on this 23rd day of January, 2002, I have sent a copy of the foregoing "Joint Comments Of WLNY-TV Inc. And Golden Orange Broadcasting Co. On Nab And ALTV Emergency Petition" by first class mail, postage prepaid, to the following:

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